



Energy and Wildlife Action Coalition
c/o Nossaman LLP
1666 K Street, NW
Suite 500
Washington, DC 20006
www.energyandwildlife.com

June 6, 2017

**Comments regarding the April 7, 2017
Draft Nationwide Programmatic Environmental
Impact Statement Evaluating the Environmental
Impacts of Proposed Modifications to the
National Flood Insurance Program**

Submitted by:

Energy and Wildlife Action Coalition

Filed electronically to the attention of:

Docket ID FEMA-2012-0012
Regulatory Affairs Division
Office of Chief Counsel
Federal Emergency Management Agency
8NE, 500 C St. SW.
Washington, DC 20472

The Energy and Wildlife Action Coalition ("EWAC") submits these comments in response to the Federal Emergency Management Agency's ("FEMA") draft nationwide programmatic environmental impact statement ("NPEIS") evaluating the environmental impacts of proposed modifications to the National Flood Insurance Program ("NFIP").¹

EWAC is a national coalition formed in 2014 whose members consist of electric utilities, electric transmission providers, and renewable energy entities operating throughout the United States, and related trade associations. The fundamental goals of EWAC are to evaluate, develop, and promote sound environmental policies for federally protected wildlife and closely related natural resources while ensuring the continued generation and transmission of reliable and affordable electricity. EWAC supports public policies, based on sound science, that protect wildlife and natural resources in a reasonable, consistent, and cost-effective manner.

In the NPEIS, FEMA explains that the Preferred Alternative (Alternative 2) includes actions to:

- Clarify that pursuant to 44 C.F.R. § 60.3(a)(2),² a community must obtain and maintain documentation of compliance with the appropriate Federal or State laws, including the ESA, as a condition of issuing floodplain development permits to develop in the floodplain.
- Clarify that the issuing of certain Letter of Map Change ("LOMC") requests (i.e., map revisions) is contingent on the community, or the project proponent on the community's behalf, submitting documentation of compliance with the Endangered Species Act ("ESA").

EWAC member operations commonly invoke scenarios where LOMC and similar actions may be involved, and EWAC believes the Preferred Alternative should be reconsidered with respect to the above bullet points.

First, requiring project proponents to demonstrate ESA section 7 compliance is an inappropriate burden for project proponents to bear. ESA section 7 is directed at federal agencies and obligates the action agencies with the burden of demonstrating compliance with ESA section 7. By shifting this burden to project proponents, it puts project proponents in the awkward position of having to demand a section 7 review for their project without the federal action agency behind or involved in the request. During typical section 7 processes, if the U.S. Fish and Wildlife Service ("Service") reaches a conclusion that the action agency does not agree with, the Service's Consultation Handbook provides for dispute resolution procedures to resolve the conflict. However, if FEMA does not play its role in the section 7 consultation, the project proponent is left in a relatively ill-defined position.

FEMA should instead play a more active role in the process and/or provide a clear pathway for project proponents to follow that incorporates the ESA section 7 standards and constraints. FEMA should emphasize a programmatic approach to ESA section 7 compliance. For example, FEMA regulations set forth an 8-step process for coordinating floodplain

¹ 82 Fed. Reg. 17023 (April 7, 2017).

² Section 60.3(a)(2) currently requires that the administrator of the NFIP: "Review proposed development to assure that all necessary permits have been received from those governmental agencies from which approval is required by Federal or State law, including section 404 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. 1334.

management activities involving wetlands. 44 CFR 9.5(f)(2). FEMA should develop something similarly practical for ESA section 7 compliance.

Second, FEMA's Preferred Alternative suggests that a concurrence letter would be required even where the project proponent has reached a "no effect" conclusion, despite that such a concurrence letter is not required under ESA section 7 and in fact disfavored by some regions of the Service. A concurrence request ("no effect" or otherwise) from a project proponent is often not at the top of the Service's priorities for a number of reasons, not the least being that the Service operates with limited resources. Requiring such a showing for LOMCs would potentially subject the project proponent to project delays.

Further, the NPEIS contains several statements that adverse impacts to ESA-listed species and designated critical habitat must be "mitigated to the maximum extent possible."³ This standard has no basis in the ESA and particularly under ESA section 7, the section arguably triggered by FEMA LOMC approvals.⁴ While many of the references to this "maximum extent possible" standard occur within the discussions about Alternative 3, and we understand the preferred alternative is Alternative 2, should the FEMA decide to incorporate or move forward with aspects of Alternative 3, the NPEIS improperly characterizes the relevant standard under the ESA.

In sum, if FEMA requires demonstration of ESA compliance for its LOMCs, FEMA should take a more traditional "action agency" role or develop clear pathways that project proponents can follow instead of pushing the responsibility down to the project proponent with little guidance. FEMA is well poised to develop programmatic pathways that minimize the burden on both the Service and project proponents and minimize project delay. FEMA should also make clear that a concurrence letter from USFWS is not required where a project proponent and/or FEMA have reached a "no effect" conclusion.

EWAC appreciates this opportunity to comment and would welcome further dialogue with FEMA on the topics above.

Please feel free to contact the following EWAC representatives:

Richard J. Meiers, EWAC Policy Chair, jim.meiers@duke-energy.com, 980-373-2363

John M. Anderson, Nossaman LLP, EWAC Policy Director, janderson@nossaman.com, 202-887-1441

Alan M. Glen, Nossaman, LLP, Partner, aglen@nossaman.com, 512-813-7943

³ See e.g., NPEIS pps. 1-10, 2-4, 2-12, 4-12, 4-16.

⁴ ESA section 10 provides authorization for non-federal project proponents seeking authorization for take of listed species. ESA section 10 requires that such applicants demonstrate they will, "to the maximum extent practicable, minimize and mitigate the impacts of such taking." The phrasing used in the NPEIS resembles this standard, but the NPEIS phrasing is neither accurate, nor applicable to the NPEIS.